IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO.42 OF 2011

1. DODSAL HYDROCARBONS
& POWER (TANZANIA) LIMITED.....1ST PLAINTIFF/APPLICANT

2. DODSAL RESOURCES & MINING
ITILIMA BUSILI (TANZANIA) PVT.....2ND PLAINTIFF/APPLICANT

3. DODSAL RESOURCES & MINING
ITINGI (TANZANIA) PVT LIMITED.....3RD PLAINTIFF/APPLICANT

VERSUS

HASMUKH BHAGWANJI MASRANI.....DEFENDANT/RESPONDENT

Date of last order: 16/08/2011
Date of oral hearings: 4th and 16th of August 2011
Date of ruling: 29/08/2011

RULING

MAKARAMBA, J.:

This is a ruling on preliminary objection on the regularity and/or competence of the pleadings and affidavits filed by the Plaintiffs/Applicants.

Briefly, on the 20th day of May 2011, the Plaintiffs/Applicants, limited companies registered in Tanzania, lodged a suit in this Court against the Defendant/Respondent, a natural person residing in Dubai, the United Arab Emirates (UAE) and having commercial and business interests in Dar es Salaam as well as in the United Arab Emirates, India, United Kingdom and

Uganda, for a Declaratory Order that the Defendant's removal from the Plaintiffs' Companies was legal and that the Defendant be permanently restrained from acting for and on behalf of the Plaintiffs purporting to be the Director of the Plaintiffs' Companies.

On the 23rd day of May 2011, the Plaintiffs/Applicants also lodged in this Court application by way of Chamber Summons under sections 68(e), 95 and Order XXXVII Rule 1(a) of the Civil Procedure Code, Cap.33 R.E. 2002 and "*any other enabling provisions of the law*" for an interim injunction order against the Respondent from acting as director of the Plaintiffs' Companies pending final determination of the final suit. The application is supported by the affidavits of RAJEN A. KILACHAND, Director of the Applicants' Companies resident of Dubai, UAE.

On the 27th day of June 2011, in his written statement of defence accompanied by the counter-affidavit of HASMUKH BHAGWANJI MASTRANI, the Defendant/Respondent in response to the affidavit of Mr. RAJEN A. KILACHAND filed in this Court on the 20th day of May 2011 the Defendant denied all the allegations by the Plaintiffs/Applicants. On the 15th day of July 2011, the Plaintiffs/Applicants lodged in this Court their reply to the written statement of defence together with the affidavits of Mr. RAJEN A. KILACHAND and Mr. MANAN SHAH and the witness statement of Mr. ABHIMANYU JALAN as basis for refuting the Defendant's allegations in the written statement of defence.

On the 3rd day of August 2011, the Defendant/Respondent filed a Notice of Preliminary Objection that at the hearing the Defendant will raise preliminary objections on the regularity and/or competence of the

pleadings and affidavits filed by the Plaintiffs and shall seek the orders for their striking out and/or removal from the court record. It is this Notice of Preliminary Objection that forms the basis of this ruling.

On the 4th day of August 2011, this Court after hearing Mr. Kibuta, learned Counsel for the Plaintiff's/Applicants accompanied by Mr. A. Mgongolwa, learned Counsel, on his concern over the general nature of the preliminary objection raised by the Defendant/Respondent's Counsel Mr. Kesaria, this Court permitted Mr. Kesaria, to address it on the substance of the contents of the Notice of the Preliminary Objection. At the close of his submissions, Mr. Kibuta prayed for a shorter adjournment to enable him prepare his reply, which prayer there being no objection from Mr, Kesaria, this Court duly granted. On the 16th day of August 2011, Dr. Ringo Tenga, learned Counsel accompanied by Mr. Kibuta, learned Counsel, made his reply submissions on the submission in support of the preliminary objection which was followed by rejoinder submissions by Mr. Kesaria, learned Counsel for the Defendant/Respondent.

The points of preliminary objection which Mr. Kesaria, learned Counsel for the Defendant/Respondent raised in his Notice of Preliminary Objection as amplified in his submissions in support thereof are two pronged. The first limb concerns defects in the pleadings and the accompanying affidavits. The second limb concerns the written witness statement.

Mr. Kesaria argues that the Plaintiff's reply to the written statement of defence filed in this Court on 15th day of August 2011 bears a **scanned signature** on behalf of the 1st, 2nd and 3rd Plaintiffs and the original

signature of the advocate, **MR. ALEX MGONGOLWA**. Pleadings bearing scanned signatures is something unheard of in our law and this Court ought to have been rejected them in the first place instead of admitting them, Mr. Kesaria argues. Further, the Plaintiff's Reply to the written statement of defence does not bear a verification clause at all and hence equally defective, Mr. Kesaria further submits.

The defective pleadings make cross-reference to the equally defective affidavits of **Mr. RAJEN A. KILACHAND** and **Mr. MANAN SHAH** which bear scanned instead of the original signatures of the deponents, Mr. Kesaria further submits. The jurat of attestation on both affidavits does not bear the date but only the place where they were sworn, Mr. Kesaria points out. An affidavit being a substitute for oral evidence if it bears a defective jurat is incurably defective and has to be struck out, Mr. Kesaria further submits supporting this contention by the decision of the Court of Appeal of Tanzania in **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV East Africa Law Reports [2002] 1 EA 47, which** deliberated on section 8 of the Notary Public and Commissioners for Oath Act, [Cap.12 RE 2002] by holding that the requirement in that section as at what place and on what date the oath or affidavit is taken or made are mandatory.

The documents bearing scanned signatures should be expunged from the court record. The defective affidavits for want of proper jurat of attestation and for bearing scanned and not original signatures should also be struck out. Similarly the reply to the written statement of defence lacking verification clause and bearing scanned signatures should also be

expunged from the court record. The witness statement, something unheard of in our law should also be expunged from the court record. These are the prayers by Mr. Kesaria.

In reply, Dr. Ringo Tenga, learned Counsel for the Plaintiffs/Applicant argues that the decision of the Court of Appeal of Tanzania in **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV** (supra) Mr. Kesaria the Defendant's Counsel relied upon is distinguishable in that nowhere in that decision it says that the date at which the oath was taken is mandatory. Since the place where the oath was taken is shown in the two affidavits, which is Dubai, then the jurat of attestation is proper Dr. Ringo surmised.

The defects in the affidavits are curable, Dr. Ringo pointed out citing the case of **OMARI MGENI VS NBC HOLDINGS & 2 OTHERS** where a preliminary objection to strike out notice of motion despite amendment was rejected; also the case of **Civil Application No.19/1993 TRANSPORT V. VALAMBIA** where an affidavit with errors (affirmative clause) was held not to be fatally defective; and the case of **Civil Application No.141/2002 DT DOBIE V PHANTOM** where Lugakingira J. (as he then was) found absence of verification clause in an affidavit not to be fatal and capable of being amended. On the basis of these authorities, the absence of date in the jurat of attestation is not that fatal and that it was an oversight which can be overlooked by this Court, Dr. Ringo submits.

As regards the witness statement by Mr. ABHIMANYU, Dr. Ringo submits that a jurat is not necessary since Order XIX Rule 3 of the Civil

Procedure Code does not create a necessary consequence that fatal for date missing thereat. Witness statements are yet to be recognized under our law Dr. Ringop concedes. However, it is not that fatal to the defendant's case and in fact it is advantageous to the Defendant that the Plaintiffs have opened up in answer to the counter-claim, Dr. Ringo reiterates, making reference to paragraph 13 of the Plaintiffs' reply where the affidavits and the written witness statements are being referred to.

As to the affidavits bearing scanned signatures, Dr. Ringo concedes that it is not a usual practice since it goes to the authenticity of the documents filed in court. However, Dr. Ringo further argues citing the decision of this Court in **Commercial Case No.10 of 2008 between LAZARUS MIRISHO MAFIE and M/S SHIDOLYA TOURS & SAFARIS vs. ODILO GASPER KILENGA Alias MOISO GASPER (Arusha sub-registry) (unreported)** giving guidance on admission in evidence of EIS that since the affidavits were sent electronically they should be accepted. The original affidavits sent by EMS are with them and upon court direction of this Court they can produce properly signed affidavits Dr. Ringo reveals. Irregularity in signatures is merely procedural and hence not prejudicial as it does not affect jurisdiction Dr. Ringo contends citing the Indian decision of **SINGH V. HIRALAL** cited in Mulla dealing with section 19 of the Indian Code of Civil Procedure, which is pari materia with section 73 of our Civil Procedure Code.

On the affidavit in rejoinder lacking original signature, Dr. Ringo submits that affidavit is part of evidence but rejoinder is part of pleadings and so far there is no clear decision by this Court on scanned signatures.

Dr. Ringo cites the decision of the Court of Appeal of Tanzania in COGECOT making a finding that an arbitral award brought by mail as being other means of communication and argues that it can be extended to include electronic communication.

In rejoinder Mr. Kesaria submits that Dr. Ringo has conceded that scanned signatures and witness statement are not a usual practice and further that there is no clear decision on scanned signatures, but has proceed to pray to amend which amounts to pre-empting the preliminary objection. Dr. Ringo ought to have applied for amendment before the preliminary objection being raised Mr. Kesaria points out. As per the decision of the Court of Appeal of Tanzania in **DB SHAPRIYA AND CO. LTD. vs BISH INTERNATIONAL BV** (supra), which is binding on this Court, both the date and the place of swearing of the affidavit is mandatory and therefore the other decisions Dr. Ringo has cited are not relevant to this case as they have nothing to do with jurat, but relate to contents of affidavits Mr. Kesaria insists.

Mr. Kesaria further insists that the witness statement is misplaced since it can be raised at the trial stage but cannot be introduced at the stage of pleadings as it tends to embarrass and prejudice the proceedings given that no scheduling order has yet to be given by this Court and that the procedure is unheard of in our law. Mr. Kesaria submits further that the provisions for taking commission under the Civil Procedure Code or statement by person who cannot be called as witness under Part IV of the Tanzania Evidence Act [Cap.6 R.E. 2001] make it possible for such statements to be given instead of oral testimony of witness. The witness

statement is not sworn and cannot be cross-examined but the witness can come and give testimony under oath, Mr. Kesaria further submits and insists that rules of procedure allow for a rejoinder as pleading not statement.

As to the argument that scanned signatures amount to electronic document Mr. Kesaria wonders under which provision of the law this contention is being made. Mr. Kesaria distinguishes the decision in the case of **LAZARUS MIRISHO MAFIE and M/S SHIDOLYA TOURS & SAFARIS vs. ODILO GASPER KILENGA Alias MOISO GASPER (Arusha sub-registry) (unreported) (supra)** relied upon by Dr. Ringo which relates to admissibility of electronic evidence at trial. Mr. Kesaria further submits that he has failed to understand how an e-mail communication which was the subject of controversy in that case could be stretched to incorporate a scanned signature. In the opinion of Mr. Kesaria, a scanned signature is not that different from a photocopy or a fax, and therefore does not qualify as an electronic document generated from a computer data base such as an e-mail.

Mr. Kesaria also distinguishes the Indian decision in **SINGH V. HIRALAL** cited in Mulla dealing with section 19 of the Indian Code of Civil Procedure, which is pari materia with section 73 of our Civil Procedure Code Dr. Ringo cited in his submissions on the ground that in the present case there is no decree to be reversed/varied which is the subject of that section, and therefore that case has been misapplied. Mr. Kesaria also distinguishes the case of **COGECOT** cited by Dr. Ringo as having no bearing on scanned signature since that case relates to the mode of

delivery of document under the Arbitration Act which was not posted but couriered and it was held not to be fatal.

Mr. Kesaria reiterates that once an objection is taken one cannot seek to amend the very document being objected to but can apply for leave to file new pleadings and prayed that the preliminary objection be upheld and the Defendant to have his costs.

Clearly, the submissions in support and rival raise some interesting legal issues particularly pertaining to pleadings and affidavits bearing scanned signatures and the witness statement. I propose to address first submissions relating to the defects in the pleadings and the affidavits before addressing issues relating to the scanned signatures and the witness statements.

I am alive to the authorities contained in the decision of the Court of Appeal of Tanzania in **LALAGO COTTON GINNERY AND OIL MILLS COMPANY LIMITED VS. LART (Civil Application No.8 of 2003); PHANTOM MODERN TRANSPORT (1985) LTD. V.D.T. DOBIE (TANZANIA) LTD. Civil Reference No. 15 of 2001 and No.3 of 2002;** and **MANORLAL AGGARWAL vs. TANGANYIKA LAND AGENCY LTD. & OTHERS Civil Reference No.11 of 1999 regarding** the position of the law on affidavits which I can safely summarize as follows:

> *"As a general rule a defective affidavit should not be acted upon by a court of law, but in appropriate cases, where the defects are minor, the courts can order an amendment by way of filing fresh affidavit or by striking out the affidavit. But if the defects are of a substantial or substantive nature, no amendment should be allowed as they are a nullity, and there can be no amendment to a nothing."*

The first limb of the preliminary objection is that the jurat of attestation in the affidavits Mr. RAJEN A. KILACHAND and Mr. MANAN SHAH is defective as they only show the place at which they were sworn but not the date on which they were sworn. The related objection is that the two affidavits contained scanned but not original signatures of the deponents.

In the words of Katiti, J. (as he then was) in **Misc. Civil Application No. 15/97 – OTTU VS AG AND OTHERS** (HCT at Dar) *"despite its being a lawyers' everyday tool, unfortunately is not defined by any statute."* The term affidavit *is* expressed in Order XIX of the Civil Procedure Code, 1966 as follows:

> *"1. A court may at any time for sufficient reason order that any **particular fact or facts may be proved by affidavit**, or that the **affidavit of any witness may be read at the hearing**, on such conditions as the court thinks reasonable:*
>
> *"3. Matters to which affidavits shall be confined*
>
> *(1) **Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove**, except on interlocutory applications on which statements of his belief may be admitted:*
> *Provided that the grounds thereof are stated."*

According to Katiti, J. (as he then was) in **Misc. Civil Application No. 15/97 – OTTU VS AG AND OTHERS** (HCT at Dar):

> *"... the lexicon meaning of the expression "affidavit" is that **it is a sworn statement in writing, made especially under oath, or***

affirmation before an authorized Magistrate or Officer." (the emphasis is of this Court)

I also join hands with His Lordship Ramadhani JA (as he then was) who stated in **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV East Africa Law Reports [2002] 1 EA 47** at page 48 that:

> *"An Affidavit has been defined as a written document containing material and relevant facts or statement relating to the matters in question or issue and sworn or affirmed and signed by the deponent before a person or officer duly authorized to administer any oath or affirmation or take any affidavit."*

As per Hon Ramadhani JA (as he then was) in **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV (supra):**

> *"It follows from this definition that an affidavit is governed by certain rules and requirements that have to be followed religiously."*

In my view, among the rules and requirements governing affidavits His Lordship Ramadhani had in mind in **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV (supra)** which in his view are "to be followed religiously" are derived from section 8 of the *Notary Public and Commissioner for Oaths Act,* which stipulates that:

> *"Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made."*

Among the person or *officer duly authorized to administer an oath or affirmation recognized by the law* who in terms of section 8 of the *Notary Public and Commissioner for Oaths Act* is mandatorily required "*truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made*" is a Notary Public and Commissioner for Oaths. The provision of section 8 of the *Notary Public and Commissioner for Oaths Act* has been a subject of judicial interpretation in a number of decisions from this Court and the Court of Appeal of Tanzania, the most recent one being **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV East Africa Law Reports [2002] 1 EA 47,** which Mr. Kesaria cited in his submissions.

In **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV** (supra) the controversy revolved around an affidavit in a notice of motion for stay of execution which did not indicate the **place** where it was sworn. The Respondent's Counsel Mr. Kilindu, raised an objection that the omission to indicate the place the affidavit was sworn contravened the mandatory provisions of section 8 of the Notaries Public and Commissioner for Oaths Ordinance (now the Act), which require a jurat to show the place at which an affidavit was sworn. The affidavit in question in that case did not disclose the place where it was sworn but only bore a rubber stamp impression of the advocate before whom it was sworn which had the name "Dar es Salaam" on it. The Respondent's Counsel, Mr. Kilindu, contended that the rubber stamp impression containing the name Dar es Salaam was not enough and does not comply with the law, and as such the affidavit was defective and ought to be struck out because there was nothing to

amend, citing the case of the High Court of Kenya in **NAROK TRANSIT HOTEL LTD AND ANOTHER V BARCLAYS BANK OF KENYA LTD [2001] LLR 852 (CCK).** In that case an affidavit which was found to have contravened section 5 of a similar law in Kenya, which section is in pari materia with section 8 Notaries Public and Commissioner for Oaths Ordinance (now the Act), was struck out.

In **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV** (supra) Professor Fimbo, the Applicant's Counsel argued that the omission to state where the affidavit was sworn is remedied by the rubber stamp impression. Professor Fimbo contended further in that the Kenyan case of **NAROK TRANSIT HOTEL LTD AND ANOTHER V BARCLAYS BANK OF KENYA LTD** cited by Mr. Kilindu is bad law because it did not discuss the purpose of section 5 of the Kenyan law (which is in pari materia with our section 8), which is to authenticate that the deponent was actually sworn, which could be achieved by the rubber stamp impression. His Lordship Ramadhani, JA (as he then was) disagreeing with the submission of Prof. Fimbo stated at pages 48-49 of the decision in **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV East Africa Law Reports [2002] 1 EA 47** as follows:

> *"I am unable to agree with Professor Fimbo's submission. The section categorically provides that the place at which an oath is taken has to be shown in the jurat. The requirement is mandatory: notary publics and commissioners for Oaths "shall state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made." The use of the word "truly" in my considered opinion underscores the need to follow the letter of the provision. This*

provision is not a sheer technicality as Professor Fimbo want this Court to find."

The ratio decidendi of **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV** (supra) in my view, is that the requirement that the jurat of attestation in an affidavit to show the place at which an oath is taken is mandatory and therefore an affidavit which does not show where it was sworn or an oath taken is fatally defective. The case of **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV** (supra) also dealt with the issue of rubber stamp impression which the Court found not to be a substitute for the mandatory requirement to show the place the affidavit or oath was taken or made.

In the present case, the **place** at which the affidavits of MANAN SHAN and RAJEN A. KILANCHAND respectively were taken is shown to be Dubai in the UAE but the **date** is not shown, but only the month of July and year 2011 are shown. The issue is whether the jurat of attestation in the two affidavits should have shown both the place and the date it was taken or made. On his part Mr. Kesaria, argues very strongly and supports his contention by **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV** (supra) that it is mandatory that both the place and the date the affidavit was taken or made should be shown. Dr. Ringo Tenga, on his part has a contrary view arguing that provided the place at which the affidavit/oath is taken or made has been shown the requirement as to the date can be dispensed with.

As I intimated above going by the ration decidendi in **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV** (supra) one cannot

conclusively argue that the case decided that both the place and the date are mandatory. That case decided that the requirement that the jurat of attestation in an affidavit to show the place at which an oath is taken is mandatory. However, considering the powerful statement by Hon. Ramadhani JA (as he then was) in that case that, "*...notary publics and commissioners for Oaths shall state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made*" and further that "*The use of the word "truly" in my considered opinion underscores the need to follow the letter of the provision*", it is my considered opinion that the jurat of attestation must show both at what place and in what date the oath or affidavit is taken or made. The twin mandatory requirements namely, the place and the date the oath is taken or affidavit is taken or made go to the authenticity of the affidavit itself. As such it is not therefore open for a deponent to pick and choose what is and what is not important. Considering that the jurat of attestation has to comply with the mandatory statutory requirement in section 8 of the Notaries Public and Commissioner for Oaths Act as regards at what place and on what date the oath or affidavit is taken or made, an affidavit which shows only where it was sworn or an oath taken without showing on what date the oath or affidavit is taken or made is fatally defective. It is mandatory that both the place at which and the date on which an affidavit is sworn or oath is taken has to be shown in the jurat of attestation. The affidavits of **MANAN SHAN and RAJEN A, KILANCHAND** show only the place they were taken to be Dubai in the UAE but without the date, which is shown only by the month of July and year 2011. As such the two affidavits by showing only the

placer they were sworn or made without showing the date when they were sworn or taken make them fatally defective. In the eyes of the law the two affidavits are not affidavits and therefore the only assistance this Court can provide as rightly submitted and prayed by Mr. Kesaria is to strike out the affidavits of **MANAN SHAN and RAJEN A, KILANCHAND**.

In the course of making his reply submissions, Dr. Ringo Tenga cited a number of decisions establishing the principle that defects in the verification clause of an affidavit are curable, including the decision of the Court of Appeal of Tanzania in **Civil Application No.8/01 – DDL E. INTERNATIONAL LTD vs THA AND OTHERS** quoting from **SALIMA VUAI, THE UNIVERSITY OF DAR vs MWENGE LUBOIL LTD.** where it was held that errors in the verification clause of an affidavit are curable by order of amendment. However, with due respect to Dr. Ringo and as correctly submitted by Mr. Kesaria, learned Counsel for the Respondent in rejoinder, the authorities Dr. Ringo relied upon concern contents of affidavits particularly defects in the verification clause which are curable while the matter before this Court concerns defects in the jurat of attestation which are incurable by amendment. Defects in the jurat of attestation in my view fall within the ambit of defects of substantial or substantive nature, which are not amenable to amendment as they are a nullity, and as such there can be no amendment to a nothing. On the other hand defects as to the contents of affidavits and the verification clause fall within the ambit of minor defects which can be amended by order of the court by way of filing fresh affidavit.

It is for the foregoing reasons that the preliminary objection that the affidavits of Mr. Manan Shah and Mr. Rajen A. Kilachand are defective for want of proper jurat of attestation is upheld. This essentially would have disposed of that preliminary objection. However, Mr. Kesaria has also raised an objection that the affidavits of Mr. Manan Shah and Mr. Rajen A. Kilachand Mr. Kesaria bear scanned signatures. Mr. Kesaria also raised an objection that the Plaintiff's reply to the written statement of defence bears a **scanned signature** on behalf of the 1st, 2nd and 3rd Plaintiffs and the original signature of the advocate something which is unheard of in our law of procedure.

Mr. Kesaria contends that the affidavits of **Mr. RAJEN A. KILACHAND** and **Mr. MANAN SHAH** by bearing scanned instead of original signatures of the deponents are defective. In his reply submissions Dr Ringo conceded that the affidavits bear scanned signatures which is not a usual practice since it goes to the authenticity of the documents filed in court. Dr. Ringo however, cites **Commercial Case No.10 of 2008 between LAZARUS MIRISHO MAFIE and M/S SHIDOLYA TOURS & SAFARIS vs. ODILO GASPER KILENGA Alias MOISO GASPER (Arusha sub-registry) (unreported)** and argues that since the affidavits in question were sent electronically they should be accepted since as the original affidavits which they now are in possession of and which were sent by EMS bear the original signatures of the deponents. Mr. Kesaria on his part argues that scanned signatures do not amount to electronic document and as such there is no provision in our law in that regard. The case of **LAZARUS MIRISHO MAFIE and M/S SHIDOLYA**

TOURS & SAFARIS vs. ODILO GASPER KILENGA Alias MOISO GASPER (Arusha sub-registry) (unreported)(supra) cited by Dr. Ringo relates to admissibility of electronic evidence at trial which in principle needs to be authenticated, Mr. Kesaria points out. An e-mail communication, which was the subject matter in that case does not incorporate a scanned signature, something which is akin to photocopy or a fax and not an electronic document generated from a computer data base, Mr. Kesaria points out.

The submissions of Counsel on affidavits and pleadings bearing scanned signatures bring to test yet for another time our law on electronic documents and electronic signatures in particular. I wish to point out here that there is a marked difference between what is called electronic signatures and scanned signatures transmitted by electronic means. The mere fact that the affidavits and the pleadings in question were transmitted by electronic means does not necessarily make the signatures affixed on them electronic signatures. As rightly pointed out by Mr. Kesaria, a scanned signature or document does differ that much from a photocopied document or signature or a faxed document bearing signature. The scanned or faxed documents or signatures in my view both reflect the original documents or signature from which the scanned or faxed documents derive. As Dr. Ringo rightly conceded, the original affidavits bearing the original signatures of the deponents were sent by EMS and they are in their possession and if so ordered by this Court they can produce them. In my considered view, the issue of electronic signatures mistakenly referred to as "digital signatures" does not arise in the present

case. I am therefore at one with the submissions of Mr. Kesaria that the case of **LAZARUS MIRISHO MAFIE and M/S SHIDOLYA TOURS & SAFARIS vs. ODILO GASPER KILENGA Alias MOISO GASPER (Arusha sub-registry) (unreported) (supra) D**r. Ringo cited in support of his contention that the decision in that case on admissibility of e-mail could be stretched to incorporate documents bearing scanned signatures as is the case presently, is not relevant to the present case. As submitted by Mr. Kesaria and rightly so in my view, the case of **LAZARUS MIRISHO MAFIE and M/S SHIDOLYA TOURS & SAFARIS vs. ODILO GASPER KILENGA Alias MOISO GASPER (Arusha sub-registry) (unreported) (supra)** dealt with the admissibility in evidence at the trial of electronically information system (EIS) to wit, an e-mail. It cannot therefore be stretched to incorporate documents bearing scanned signatures be at the pleading or the trial stage.

I wish, for purposes of putting the record straight, state here that whereas "***electronic signatures***" are the electronic equivalents of written signatures which allow businesses to sign documents and carry out business transactions electronically, they are not a picture of the handwritten signature as is the case for scanned signatures. A scanned signature or a photocopied signature or a faxed signature for that matter is therefore a picture of the handwritten signature whose original can be produced on demand as verification for authenticity of the signature contained thereat. Electronic signatures are therefore not merely convenient alternatives to written signatures. In any event contrary to what most people expect, a digital or electronic signature alone doesn't

display an image of someone's signature or a mark to illustrate one's consent regarding a document, nor is it part of the document at all. Instead, the digital or electronic signature is often linked to a document by a database application that a business enterprise or company typically creates to store it.

Both Counsel for the parties concede that in Tanzania there is as yet no law providing specifically for electronic signatures. In the United Kingdom and the USA different perhaps from Tanzania and many other countries, electronic signatures add to the list of possibilities of conducting business electronically. In the United Kingdom, the **Electronic Communications Act of 2000** has made it clear that electronic signatures are admissible in evidence about the authenticity or integrity of a communication or data (see Section 7(1) of the Act). A European directive has ensured the effectiveness of electronic signatures across Europe. Legislation in the USA particularly the Government Paperwork Elimination Act ("GPEA"), the Uniform Electronic Transactions Act ("UETA") , and some sections within the Code of Federal Regulations ("CFR"), as well as the Electronic Signatures in Global and National Commerce Act ("ESIGN"), and in many other countries has done the same elsewhere. So what exactly is an electronic signature? Here are the definitions from laws important laws and government agencies. In the USA, **the ESIGN Act Sec 106 definitions:**

> *"(2) ELECTRONIC- The term 'electronic' means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.*

(4) ELECTRONIC RECORD- The term `electronic record' means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.
(5) ELECTRONIC SIGNATURE- The term `electronic signature' means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.

GPEA Sec 1710 definitions:

"(1) ELECTRONIC SIGNATURE.—the term "electronic signature" means a method of signing an electronic message that—
(A) identifies and authenticates a particular person as the source of the electronic message; and
(B) indicates such person's approval of the information contained in the electronic message.

UETA Sec 2 definitions:

"(5) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
(6) "Electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.
(7) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.
(8) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

Federal Reserve 12 CFR 202 definitions: refers to the ESIGN Act Commodity Futures Trading Commission 17 CFR Part 1 *Sec. 1.3 definitions:*

"(tt) Electronic signature means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

Food and Drug Administration 21 CFR Sec. 11.3 definitions:

"(5) Digital signature means an electronic signature based upon cryptographic methods of originator authentication, computed by using a set of rules and a set of parameters such that the identity of the signer and the integrity of the data can be verified.
(7) Electronic signature means a computer data compilation of any symbol or series of symbols executed, adopted, or authorized by an individual to be the legally binding equivalent of the individual's handwritten signature."

I wish to take this opportunity to call upon the concerned authorities in Tanzania to think seriously about putting in place a law addressing issues pertaining to electronic information systems (EIS) generally and specifically for electronic or digital signatures, now so common particularly in the banking industry, so as to ensure that Tanzania is not left behind but matches ahead with the rest of the world in the digital age. The Government through Parliament should therefore consider seriously putting in place a law to among other things define the liability and validity of an electronic signature, and help the courts answer the questions about enforceability, which are bound to arise in the future since this country is already doing e-commerce with other countries. as well as from other countries which have in place such kind of legislation. I wish also to allay the fears some "*electronic age doubting thomases*" might be entertaining over the use of electronic signatures that in actual fact there is far less fear than initially thought of on the use of electronic or digital signature in

business transactions, which has become so popular and is of wider use in most of Europe, USA, Asia, and Australia. It is quite relieving however to learn that over 100 years ago, people were using the Morse code and the telegraph to electronically accept contracts before the development of facsimile or fax machine. An early validation of electronic signatures came from the New Hampshire Supreme Court in 1869 in **HOWLEY V. WHIPPLE, *48 N.H. 487*** where it was stated that:

> *"It makes no difference whether [the telegraph] operator writes the offer or the acceptance in the presence of his principal and by his express direction, with a steel pen an inch long attached to an ordinary penholder, or whether his pen be a copper wire a thousand miles long. In either case the thought is communicated to the paper by the use of the finger resting upon the pen; nor does it make any difference that in one case common record ink is used, while in the other case a more subtle fluid, known as electricity, performs the same office." See* http://www.isaacbowman.com/the-history-of-electronic-signature-laws

In the present case, the scanned signatures appearing on the Plaintiffs' plaint, the plaintiffs' reply to the written statement of defence and in the two affidavits cannot therefore by any stretch of imagination be said to have been produced by a "*more subtle fluid known as electricity.*" The scanned signature in the pleadings and the affidavits originally were affixed by a signature "*by the use of the finger resting upon the pen*", of the signatories, and then the documents bearing the original signatures which Dr. Ringo informed this Court that they have them, were then scanned. If it is the case for the Plaintiffs/Applicants as conveyed to this Court by Dr. Ringo in his own words while making his submissions that now they have

with them the pleadings and the affidavits bearing the original signatures of the deponents then this Court does not find any valid reasons for admitting and entertaining pleadings and affidavits bearing the scanned signatures. In any event, the law as it currently stands does not yet allow documents bearing scanned signatures for use in court.

An affidavit is part of evidence but a rejoinder is part of pleadings as Dr. Ringo Tenga rightly pointed out. As I intimated to above however, so far there is no clear decision by this Court on scanned signatures, which as I have said cannot be equated to electronic or digital signatures. The ***COGECOT case*** cited by Dr. Ringo, as rightly submitted by Mr. Kesaria has no bearing at all to scanned signature let alone being relevant to the present case since in that case what was under consideration was the mode of delivering a document under the Arbitration Act, which was couriered and the Court in that case took it as being another mode of communication.

In the course of making his submissions, Dr. Ringo implored upon this Court to consider the irregularity in the signatures as being merely procedural, citing the decision of **SINGH V. HIRALAL** cited in Mulla dealing with section 19 of the Indian Code of Civil Procedure, which is pari materia with section 73 of our Civil Procedure Code. I am at one with Mr. Kesaria that section 73 which bars reversal or varying of decree or remand of case on appeal, on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the court that it is inapplicable to the present case. However, the irregularity in signatures in

the pleadings is a procedural matter which does not affect jurisdiction and can be cured with leave by the Applicants presenting properly signed pleadings.

In my considered view however, the defects in the pleadings in so far as they bear scanned signatures are concerned, namely, the Plaintiff's reply to the written statement of defence which bear a **scanned signature** on behalf of the 1st, 2nd and 3rd Plaintiffs can be cured simply by way of amendment upon leave of the court. This equally applies to the objection that the Plaintiff's Reply to the written statement of defence does not bear a verification clause, which defect is curable by amendment. This however cannot be said of the affidavits of Mr. RAJEN A. KILACHAND and Mr. MANAN SHAH, which not only bear scanned instead of original signatures of the deponents but lack proper jurat of attestation thus making them fatally defective and hence incurable by amendment and hence liable to be struck out and expunged from the court record.

I shall now turn to consider the preliminary objection as regards the witness statement of Mr. ABHIMANYU JALAN dated 13th day of July 2011. Mr. Kesaria contends that witness statement is not known in our law and prayed to this Court to make an order expunging it from the court record. Mr. Kesaria argues further that the witness statement is misplaced since it can only be raised at the trial stage not at the stage of pleadings as it tends to embarrass and prejudice the proceedings. The gist of the objection by Mr. Kesaria to the witness statement is that the procedure is unheard of. Mr. Kesaria points out that our law recognizes the taking commission or producing witness statement under Part IV of the ***Tanzania***

Evidence Act *[*Cap.6 R.E. 2001]. Witness statement is given instead of oral testimony and is not sworn and hence cannot be cross-examined Mr. Kesaria points out. In any event the witness can come and give testimony under oath. Further, that rules of procedure allow for a rejoinder as pleadings not witness statements. As Mr. Kesaria stated and rightly so in my view to which view Dr. Ringo conceded, the procedure for witness statements is unheard in our law. The Civil Procedure Code only recognizes the proving of fact or facts by affidavits or viva voce through witness testimony as stipulated under ORDER XIX thus:

> "1. *A court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:*
>
> *Provided that where it appears to the court that either party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit."*

In my considered view, the gist of Rule 1 of Order XIX of the Civil Procedure Code is that the court has discretion upon sufficient reason to order particular fact or facts to be proved by affidavit or that *the affidavit of any witness may be read at the hearing.* In terms of the proviso to Rule 1 of Order XIX of the Civil Procedure Code however, where it appears to the court that either party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, the Court does not have to make an order authorizing the evidence of such witness to be

given by affidavit. In my view, proving of any fact or facts by affidavit is an exception to the general rule that facts are to be proved *viva voce* through witness testimony is subjected to cross-examination. If anything then if we may venture to equate the witness statement with an affidavit as envisaged under Rule 1 of Order XIX of the Civil Procedure Code, it could then only be produced by order of this Court and upon sufficient reasons given and subject to "*such conditions as the court thinks reasonable.*" This is the case presently. The Plaintiffs'/Applicants of their own volition have elected to prepare a witness statement which they lodged in this Court without any order of the court as required under the law. And this without even without assigning any reason as to why they elected to resort to such course of action. Furthermore, the learned Counsel for Plaintiffs/Applicants has not informed this Court whether or not they desire to have the maker of the witness statement available for cross-examination at the trial. In any event and as rightly submitted by Mr. Kesaria, where the maker of the statement will be available for cross-examination there would not be any need to have his witness statement, which in any case is not recognized under our law. In any event much as the witness statement has been to the advantage of the Defendant as argued by Dr. Ringo, the law does not allow for such course of action. However, with due respect to Mr. Kesaria, there is nothing in the law to suggest that prove of facts by affidavit can only be done at the stage of trial but not pleadings. The law categorically stipulates that the "*court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit.*" Much as the witness statement does not in any way embarrass or prejudice the

opposite side, this Court does not find any provision of the law for their admittance. I very much appreciate the adage that rules of procedure are handmaidens of justice, but all in all rules of procedure are geared at putting in place an orderly conduct of the business of litigation with a view to eliminate elements of bias and surprises. Unfortunately, the existing law of procedure does not allow for witness statement. In fine the witness statement can safely be expunged from the court record.

Mr. Kesaria raised a further objection that the Plaintiff's Reply to the written statement of defence does not bear a verification clause at all and therefore it is equally defective. As I intimated to earlier since I have held that the procedure for admitting witness statement is not recognized in our law, it will be academic to explore the effect of lack of verification clause in the witness statement. In any event had the witness statement been admitted, lack of a verification clause is not that fatal as it could be amended.

In fine, the preliminary objection that the affidavits of Mr. RAJEN A. KILACHAND and Mr. MANAN SHAH are incurably defective for want of proper jurat of attestation is hereby upheld. Accordingly, the affidavits of Mr. RAJEN A. KILACHAND and Mr. MANAN SHAH are hereby expunged from the court record.

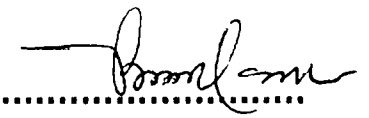
The affidavit of Mr. RAJEN A. KILACHAND in support of the application is defective for bearing scanned signatures, which defect with leave of this Court is curable by amendment with leave of this Court.

The defects in the Plaintiff's reply to the written statement of defence, to wit, lack of verification clause and for bearing scanned

signatures and not original signatures, which defects also appear in the Plaint which does not also have a verification clause and bears scanned signatures on behalf of the 1st, 2nd and 3rd Plaintiffs and not original signatures are curable by way of amendment with leave of this Court.

The witness statement of Mr. ABHIMANYU JALAN is unknown in our law. It is hereby expunged from the court record.

The defendant shall have his costs, which costs shall be in the cause. Order accordingly.



R.V. MAKARAMBA

JUDGE

29/08/2011

Words account: 8,864

Ruling delivered this 29th day of August 2011 in the presence of:

For the Plaintiffs/Applicants: Dr.Tenga, Mr.Kibuta, Mr. Cuthbert and Mr. Biseko

For the Defendants/Respondents: Mr. Kamala.

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R.V. MAKARAMBA

JUDGE

29/08/2011